SUPREME COURT, U. S.

FILED

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NO. 1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

YOUNG AND COMPANY, ET AL, *Petitioners*

v.

R. J. SHEA, DEPUTY COMMISSIONER OF LABOR, ET AL, *Respondents*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INDEX OF AUTHORITIES

CASES	Page
Calbeck v. Strachan Shipping Company, 5 Cir. 1962, 306 F.2d 693, at p. 695, cert. den. 372 U.S. 954, 83 S.Ct. 950, 9 L.Ed. 2d 978 (1963)	4
Del Vecchio v. Bowers, 296 U.S. 280, at p. 286, 80 L.Ed. 229, at p. 233, 56 S.Ct. 190 (1935)	3, 4
Furlong v. O'Hearne, 144 F. Supp. 266, 271 (D.C. Maryland, 1966, aff'd 240 F.2d 958 (4 Cir. 1967)	4
John W. McGrath Corporation v. Hughes, 2 Cir. 1959, 264 F.2d 314, at p. 317, cert. den. 360 U.S. 931, 3 L.Ed. 2d 1545, 79 S.Ct. 1451 (1959)	4
LeBlanc v. Henderson, 5 Cir. 1962, 301 F.2d 482, at p. 484	4
Liberty Mutual Insurance Co. v. Gray, 9 Cir. 1943, 137 F.2d 926, at p. 928	4
Pillsbury v. Liberty Mutual Insurance Co., 9 Cir. 1944, 143 F.2d 807, at p. 809	4

UNITED STATES STATUTES	
33 U.S.C.A. §920	3, 4, 5

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Petitioners do not wish to unduly burden the Court with any lengthy reply and file this reply only because the Respondent-Deputy Commissioner's Brief in Opposition, with all due respect, does not even attempt to meet the principal question presented for consideration by this Court:

> Are the employer and its compensation carrier entitled, under the due process clause, to a fair and impartial adjudication of their rights under the Longshoremen's Act by an impartial trier of the facts?

Respondent's Brief in Opposition is directed solely to the merits of the collateral estoppel question, which as we pointed out in the Petition is of small significance when compared with the constitutional questions of due process. As it is clear that the holding of the Court of Appeals below that the doctrine of collateral estoppel did not apply was based solely on an alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee" and against his employer, the constitutionality of such an alleged policy and whether it exists at all, are both questions which must be considered before the merits of the collateral estoppel question are even reached. What the Respondent's Brief in Opposition tries to do (apparently following the lead of the Court of Appeals below) is to completely ignore the serious constitutional questions involving the due process clause. We suppose Respondent thus hopes that this Court will do likewise in order that he can continue to issue compensation orders without meeting the most elementary requirements of the due process clause of a fair hearing and as an impartial trier of doubtful fact questions.

1.

The Respondent attempts to justify by implication only the alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee" and against the employer by relying on the statutory pre-

sumptions in Section 920 of the Act.[1] In so doing, Respondent completely ignores and disregards the very limited effect of these statutory presumptions as stated by this Court:

> ". . . Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. *It never had and cannot acquire the attribute of evidence in the claimant's favor. It's only office is to control the result where there is an entire lack of competent evidence.* If the employer alone produces evidence which tends to support the theory of suicide, the case must be decided on that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, the issue must be resolved upon the whole body of proof pro and con. . . ."[2] (Emphasis supplied)

Thus, the only function of these statutory presumptions, as this Court held in *Del Vecchio,* is to control the result where there is an entire lack of competent evidence. Once the substantial dispute on the question of injury arose in in the evidence before the Deputy Commissioner, the statutory presumption went completely and absolutely out of

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1. 33 U.S.C.A. §920 reads in full as follows:

"§920. PRESUMPTIONS

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.
(b) That sufficient notice of such claim has been given.
(c) That the injury was not occasioned solely by the intoxication of the injured employee.
(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

2. *Del Vecchio v. Bowers,* 296 U.S. 280, at page 286, 80 L.Ed. 229, at page 233, 56 S.Ct. 190 (1935).

the case.[3]

The Court of Appeals below fully recognized the very limited nature of the statutory presumptions in Section 920, on which the Brief in Opposition relies so heavily in an attempt to persuade this Court not to consider the serious constitutional questions involving the due process clause. The Court of Appeals below recognized that these statutory presumptions did not support its alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee" and against his employer when it succinctly stated:

> ". . . Under 33 U.S.C.A. §903(a), the claimant has the burden of proving all that is not presumed under Section 920. See *Eschbach v. Contractors, Pacific Naval Air Bases,* 7 Cir. 1950, 181 F.2d 860. Section 920 does not presume an injury so the claimant must prove its existence. *O'Hearne,* D. Maryland, 1960, 181 F. Supp. 368, 371".[4]

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3. Althoug the *Del Vecchio* case involved the presumption against suicide contained in Section 920(d), it is clear that it applies to all of the presumptions in that section of the Act. It has been held expressly to apply to the presumption in Section 920(a) "that the claim comes within the provisions" of the Act which is the presumption on which the Respondent's Brief in Opposition relies in this case. See: *John W. McGrath Corporation v. Hughes,* 2 Cir. 1959, 264 F.2d 314, at page 317, cert. denied 360 U.S. 931, 3 L.Ed.2d 1545, 79 S.Ct. 1451 (1959); *Liberty Mutual Insurance Co. v. Gray,* 9 Cir. 1943, 137 F.2d 926, at page 928; *Pillsbury v. Liberty Mutual Insurance Co.,* 9 Cir. 1944, 143 F.2d 807, at page 809.

4. Appendix C, page 5C, Petition for Writ of Certiorari; 397 F.2d 185, at page 188. While the Court of Appeals below cited only two cases in support of these propositions, to the same effect is *Furlong v. O'Hearne,* 144 F.Supp. 266, 271 (D.C. Maryland, 1966, aff'd 240 F.2d 958 (4 Cir. 1967). Likewise the decisions also hold that the claimant has the burden of proof in establishing disability emanating from the accidental injuries. See: *Calbeck v. Strachan Shipping Company,* 5 Cir. 1962, 306 F.2d 693, at page 695, cert. denied 372 U.S. 954, 83 S.Ct. 950, 9 L.Ed.2d 978 (1963) and *LeBlanc v. Henderson,* 5 Cir. 1962, 301 F.2d 482, at page 484.

Thus, it is clear that the statutory presumptions in Section 920 of the Longshoremen's Act do not create or support to any extent any alleged "statutory policy" such as that announced by the Court of Appeals below. And even if they did such a policy would clearly be unconstitutional under the due process clause.

2.

Nor are we concerned on this petition with a question of depriving the deputy commissioner of his right to carry out the functions given to him by the Congress as the Brief in Opposition would attempt to lead the Court to believe. Rather we are concerned here with the question of the constitutionality of the process by which he arrives at his determination of doubtful fact issues. If, as the Brief in Opposition contends, there is such an alleged "statutory policy that all doubtful fact questions are to be resolved in favor of the employee" and against his employer, on what basis can this exist constitutionally under the due process clause of the Fifth Amendment? Obviously, it cannot exist constitutionally unless a fair hearing by an impartial trier of the facts is no longer required by the due process clause.

We are certain that deputy commissioners under the Longshoremen's Act would very much like to have the burden and responsibility of determining difficult fact questions taken from their shoulders under such an alleged statutory policy. This would make their job extremely easy, if they were laboring under such a statutory policy, for once some doubt is created on a question, then they would be required by this alleged statutory policy under the holding of the Court of Appeals below to resolve that issue always in favor of the injured employee and always against the employer and its insurance carrier. Once doubt-

ful questions are raised the deputy commissioner would no longer be an impartial hearing officer, an impartial trier of the facts, but he would be bound by the alleged statutory policy to resolve these issues all one way and this even though he believed in his heart that the facts ought to be resolved in favor of the employer and its insurance carrier. Under the alleged statutory policy of the Court of Appeals below the deputy commissioners would no longer have any discretion to decide a doubtful fact question in favor of the employer or the insurance carrier—they would have to resolve all of them in favor of the injured employee.

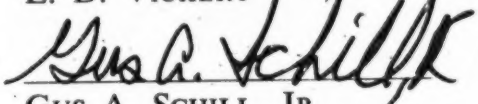
If this is not directly contrary to all our concepts of due process, it is impossible to imagine what type of proceeding could be devised which would violate the due process clause any more.

CONCLUSION

Petitioners respectfully urge this Court to grant their Petition herein in order that the important constitutional due process questions in administrative hearings might be fully considered by the court.

Respectfully submitted,

E. D. VICKERY



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CERTIFICATE OF SERVICE

I certify that copies of this Petition for Writ of Certiorari were served on Mr. W. Jiles Roberts, Americana Building, Houston, Texas 77002, attorney for the Respondent, Paul Tugwell, and on the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, Mr. William D. Ruckelshaus, Assistant Attorney General, Mr. Morton Hollander and Mr. Ralph A. Fine, Attorneys, Department of Justice, Washington, D.C. 20530, on the Honorable Anthony J. P. Farris, United States Attorney, Mr. James R. Gough, Mr. Jack Shepherd and Mr. Carl Walker, Assistant United States Attorneys, P. O. Box 61129, Houston, Texas 77061, on Honorable Charles Donahue, Solicitor of Labor, Department of Labor, Washington, D. C., and on Mr. Alfred H. Meyers and Mr. Arthur Bolstein, attorneys for Respondents, R. J. Shea and Gerald Leavey, Deputy Commissioners, by mailing said copies to them at their last known addresses as shown above by first class mail, air mail to out of town addresses, on this the 13th day of May, 1969.

Of Royston, Rayzor & Cook